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The Erosion of Informed Consent to Abortion

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I. INTRODUCTION

In *Thornburgh v. American College of Obstetricians and Gynecologists,*[1] Supreme Court Justice Harry Blackmun stated, "[t]he States are not free, under the guise of protecting maternal health or potential life, to intimidate women into continuing pregnancies."[2] Unfortunately, the Supreme Court overruled this position in *Planned Parenthood of Southeastern Pennsylvania v. Casey.*[3] In a plurality opinion, the *Casey* Court upheld an informed consent statute and set forth a new standard for evaluating the constitutionality of statutes that regulate abortion, known as the "undue burden" standard.[4] One of the Court's primary motivations for promulgating this new standard was to allow states, in their regulation of abortion, to express their preference for childbirth.[5] Contrary to Justice Blackmun's proclamation, today, under the undue burden standard, states *are* free to intimidate women into continuing their pregnancies under the guise of protecting maternal health and potential life.[6] The question before the circuit courts is whether states may do so by disguising their moral propaganda as medically accurate and relevant information, and by coercing physicians to deliver this ideology as a part of the process of informed consent to the abortion procedure.[7]

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[1] 476 U.S. 747, 759 (1986) *overruled by* Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833 (1992).
[2] *Id.*
[3] 505 U.S. 833 (1992).
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] *See, e.g.,* Texas Med. Providers Performing Abortion Services v. Lakey, 667 F.3d 570 (5th Cir. 2012); Planned Parenthood Minnesota v. Rounds, 467 F.3d 716 (8th Cir. 2006); Planned Parenthood Minnesota, N. Dakota, S. Dakota v. Rounds, 686 F.3d 889 (8th Cir. 2012). *See also* Stuart v. Huff, No. 1:11-CV-804, 2011 WL 6740400 (M.D.N.C. Dec. 22, 2011) *aff'd*, No. 12-1052, 2013 WL 265083 (4th Cir. Jan. 24, 2013).

The American Medical Association (AMA) defines informed consent as "a process of communication *between a patient and physician* that results in the patient's authorization or agreement to undergo a specific medical intervention."[8] On the AMA website, notably under the heading "Patient Physician Relationship Topics," the AMA lists a number of guidelines that physicians should follow in conducting the process of informed consent.[9] The AMA suggests that physicians performing the procedure discuss the diagnosis, nature, purpose, risks, and benefits of the suggested treatment, alternative treatments and their risks and benefits, and the risks and benefits of refraining from treatment altogether.[10] Nowhere does the AMA suggest that physicians offer patients their own individual moral or political opinions about a given treatment, let alone states' moral and political viewpoints.[11] In fact, AMA guidelines do not suggest that states play *any* role in shaping the informed consent dialogue, except to say that obtaining informed consent is both a legal and ethical obligation.[12]

While the process of informed consent adheres to AMA guidelines for most medical procedures, the process of informed consent to an abortion has strayed drastically from that paradigm.[13] This shift is primarily attributable to the Supreme Court's decisions in *Casey*[14] and *Gonzalez v. Carhart*.[15] Some states have argued that the holdings of these cases give them license to commandeer the physician-patient relationship in the context of abortion, so as to ensure that "so grave a choice is well informed."[16] Apparently these states do not consider the

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[8] AMERICAN MEDICAL ASSOCIATION, https://www.ama-assn.org/ama/pub/physician-resources/legal-topics/patient-physician-relationship-topics/informed-consent.page (last visited January 21, 2013). (emphasis added).
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *State Policies In Brief: Counseling and Waiting Periods for Abortion*, GUTTMACHER INSTITUTE, http://www.guttmacher.org/statecenter/spibs/spib_MWPA.pdf (last visited January 21, 2013).
[14] Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833 (1992).
[15] 550 U.S. 124 (2007).
[16] *Id.*

standard process of informed consent, which is both ethically and legally adequate to inform patients of all relevant information for every other medial procedure, to be sufficient to ensure informed consent to the abortion procedure.[17] Or perhaps it is women's ability to make informed decisions that these states question.[18] Whatever their motivation, these states have taken advantage of the wide latitude the aforementioned Supreme Court cases have afforded them, and have reformed their informed consent statutes in the context of abortion.[19]

Previously, informed consent statutes typically consisted of a number of *topics* that physicians were required to discuss with their patients, but physicians still had the discretion to decide the specific content of the conversation.[20] *Physicians* were free to convey information regarding each topic that they, in *their* judgment, believed to be most accurate, credible, and germane to their patients' specific circumstances.[21] Recently revised informed consent statutes, however, require that physicians convey *specific information* that *states* consider accurate,

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[17] *Casey*, 505 U.S. at 872 ("Though the woman has a right to choose to terminate or continue her pregnancy before viability, it does not at all follow that the State is prohibited from taking steps to ensure that this choice is thoughtful and informed. Even in the earliest stages of pregnancy, the State may enact rules and regulations designed to encourage her to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term and that there are procedures and institutions to allow adoption of unwanted children as well as a certain degree of state assistance if the mother chooses to raise the child herself.").

[18] Maya Manian, *The Irrational Woman: Informed Consent and Abortion Decision-Making*, 16 DUKE J. GENDER L. & POL'Y 223, 224–25 (2009) ("*Carhart's* portrayal of women evokes a century-old societal view of femininity. The *Carhart* Court's cabined view of women's decision-making capacity reflects a gender-stereotyped view of women's nature. The Court also exposed its discriminatory view of women as decision-makers by articulating a new paradigm of "informed consent" in the abortion context that controverts well-established rules of patients' right to informed consent in healthcare law. This article focuses on *Carhart's* disturbing reasoning--that competent adult women lack the capacity to determine for themselves what is best for their own health--and evaluates its implications in the abortion context and in other areas of medical treatment related to pregnancy.").

[19] *State Policies In Brief: Counseling and Waiting Periods for Abortion*, GUTTMACHER INSTITUTE, http://www.guttmacher.org/statecenter/spibs/spib_MWPA.pdf (last visited January 21, 2013). *See also* cases cited *supra* note 7 pp. 1.

[20] *See* Karlin v. Foust, 188 F.3d 446, 465 (7th Cir. 1999).

[21] *See* Planned Parenthood of Cent. Missouri v. Danforth, 428 U.S. 52, 67 (1976). *See also* Amanda McMurray Roe, *Not-So-Informed Consent: Using the Doctor-Patient Relationship to Promote State-Supported Outcomes*, 60 CASE W. RES. L. REV. 205, 206–07 (2009) ("The relatively recent development of informed consent statutes for specific procedures, however, seems to have upended the traditional notion of informed consent. Instead of promoting autonomous choice, these statutes mandate that doctors provide particular disclosures about certain procedures. In addition, rather than providing patients with objective information, some of these statutes appear to provide patients with slanted information that pushes them toward a predetermined 'right' choice.").

significant, and relevant.[22] Many of these mandated disclosures consist of information that is disputed in the medical community or taken out of context, as well as information that pertains solely to the embryo or fetus, and not the risks and benefits of the procedure itself.[23]

These recently revised informed consent statutes have been subject to constitutional challenges on both First and Fourteenth Amendment grounds.[24] The mandated specific disclosures have been challenged as violating the First Amendment free speech rights of physicians by unconstitutionally compelling their speech.[25] These statutes have also been challenged as unconstitutionally violating women's privacy rights under the Fourteenth Amendment, by imposing an undue burden upon women's right to an abortion.[26] Statutes regulating abortion are not evaluated under traditional First or Fourteenth Amendment principles.[27] Rather, statutes that regulate abortion are analyzed under the undue burden standard promulgated in *Casey*.[28] Some courts have held that these statutes are constitutional under the undue burden standard, some have held that they are not, and still others have upheld or struck these statutes on First Amendment grounds.[29]

Though, in its disjointed, plurality opinion, the *Casey* Court *did* hold that states have the right to express their preference for childbirth and to persuade women not to have an abortion, the Court did *not* intend to allow states covey their preference for childbirth through mandatory disclosures of inaccurate, misleading, and irrelevant information in the informed consent

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[22] *See Casey*, 505 U.S. 833 *and* Gonzalez v. Carhart, 550 U.S. 124 (2007).
[23] *State Policies In Brief: Counseling and Waiting Periods for Abortion*, GUTTMACHER INSTITUTE, http://www.guttmacher.org/statecenter/spibs/spib_MWPA.pdf (last visited January 21, 2013).
[24] *See* cases cited *supra* note 7 pp. 1.
[25] *Id.*
[26] *Id.*
[27] *Id. See generally Casey*, 505 U.S. 833 *and Gonzalez*, 550 U.S. 124.
[28] *Id.*
[29] *Id.*

process.[30] Unfortunately, due to the combined effects of the confusing and disorganized manner in which the standard was promulgated and the practice of giving great deference to states, such a result has been permitted by some courts under the undue burden standard.[31] The troubling consequence of granting unwarranted deference to states while applying this already unclear and manipulable standard is erosion of the informed consent process.[32] What was once a private, personal, and professional dialogue between physicians and their patients concerning medically objective and relevant information is warping into a monologue of legislatively coerced recitations of anti-abortion propaganda.[33]

This Comment argues in favor of a three-step approach for creating a version of the undue burden standard that will prevent this erosive result and effectuate the intent of the *Casey* Court. First, this Comment suggests restructuring the currently malleable and shapeless undue burden standard into a three-prong test.[34] Organizing the elements of the undue burden standard into a structured, three-prong, disjunctive test will require courts to engage in a complete analysis, and prevent them from manipulating the undue burden standard by emphasizing just

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[30] Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833 872, 878–82 (1992) ("*[I]f* the information the State requires to be made available to the woman is truthful and not misleading, the requirement may be permissible.") (emphasis added).

[31] *See generally* Ian Vandewalker, *Abortion and Informed Consent: How Biased Counseling Laws Mandate Violations of Medical Ethics*, 19 MICH. J. GENDER & L. 1, 45–49 (2012).

[32] *Id.* at 66–67 ("There is no doubt that the abortion-specific biased counseling statutes discussed fail the AMA's ethical standards, especially since the AMA 'opposes legislative measures that would impose procedure-specific requirements for informed consent or a waiting period for any legal medical procedure.' The requirement that physicians present facts accurately disqualifies deceptive and misleading statements. Making statements that the patient does not want to hear is unethical according to the AMA, and the patient's expressed desire not to be given certain information should be respected. Finally, there is nothing that provides support for forcing patients to be exposed to the results of an ultrasound against their wishes.").

[33] *Id.* at 70 ("Abortion opponents have attempted to co-opt the doctrine of informed consent to further their political goal of reducing the number of abortions . . . . This vision should be rejected, *as should the cynical use of the banner of informed consent to disguise an anti-abortion agenda*. . . biased counseling laws . . . cannot be part of ethical informed consent practices because they are designed to make women's choices regarding ending their pregnancies less well-informed and less voluntary, all in the hope of discouraging abortions.") (emphasis added).

[34] *Casey*, 505 U.S. at 930, 985–86 ("the *Roe* framework is far more administrable, and far less manipulable, than the undue burden standard adopted by the joint opinion.") (Blackmun,, J., dissenting) (internal quotation marks omitted) *and* ("[I]ts efforts at clarification make clear only that the standard is inherently manipulable and will prove hopelessly unworkable in practice.") (Scalia, J., dissenting).

one of the elements.[35] Under this proposed test, the burden is on the plaintiff challenging the statute to demonstrate that (1) the mandated disclosure or disclosures are (a) not truthful, (b) misleading, or (c) irrelevant to the abortion procedure; (2) the statute is not calculated to inform women's decision, and therefore has an improper purpose; or (3) the statute has the effect of creating a substantial obstacle for women seeking an abortion.[36] If a plaintiff is able to demonstrate any of the above, the statute fails the undue burden analysis and is struck down as an unconstitutional undue burden on women's Fourteenth Amendment privacy right to an abortion. Courts must engage in an exhaustive analysis of each prong before determining that a challenged statute is constitutional.

Next, this Comment proposes that each subpart of the first prong of the analysis, namely, whether the information is truthful, non-misleading, and relevant to the abortion procedure, must be evaluated independently.[37] For example, courts should not assume that information is non-misleading based solely on a finding that the information is truthful, as truthful information that is taken out of context can certainly be misleading.[38] Finally, this Comment argues for decreased legislative deference in evaluating the first and second prongs of the analysis.[39] Where

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[35] *See supra* note 30 pp. 5 *and infra* note 38.

[36] *See generally Casey*, 505 U.S. 833. Each of the elements of the suggested three-prong analysis is present in the *Casey* joint opinion. The solution lies both in organizing the elements in a way that is more rigid and easier to apply, and in making the additional proposed adjustments in applying the rigid version of the standard.

[37] *See infra* note 38.

[38] Ian Vandewalker, *Abortion and Informed Consent: How Biased Counseling Laws Mandate Violations of Medical Ethics*, 19 Mich. J. Gender & L. 1, 62 (2012) ("Biased counseling laws go further than the requirements just mentioned, however. They include exaggerated and misleading information about risks of serious outcomes like infertility and psychological problems. Such statements violate communicative norms requiring adequate accuracy and the inclusion of qualifying statements. For example, Michigan requires that patients be told that as the result of an abortion, some women may experience depression, feelings of guilt, sleep disturbance, loss of interest in work or sex, or anger. This statement is literally true, but it omits relevant qualifications. Most women who get abortions do not experience significant problems like those mentioned, and most women who do have negative psychological outcomes after abortions experienced other stressors prior to and distinct from their abortions. The statement is calculated to mislead patients into thinking the risk is greater than it really is, which makes it a violation of the epistemic norms that govern informed consent transactions.") (internal quotation marks omitted).

[39] *Casey*, 505 U.S. at 925 ("The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant. Looking at this group, the Court inquires, based on *expert testimony*, *empirical studies*, and *common sense*, whether in a large fraction of the cases in which the restriction is relevant, it

disclosures of medical fact are involved, deference is more properly allocated to the weight of medical evidence and the majority view of the medical community, not the opinion of the legislature.[40] Furthermore, it is inappropriate to defer to the stated legislative purpose where the distinction between a proper purpose (to persuade) and an improper purpose (to hinder) is so fine.[41] Adopting the suggested approach will enable courts to apply the undue burden standard in a way that permits the states to further their interests protecting potential life and expressing their preference for childbirth, while also affording greater protection to women's Fourteenth Amendment privacy right to an abortion.

Part II of this Comment provides a brief background on the history and fundamental principles of informed consent. Part III reviews the Supreme Court cases that have shaped abortion jurisprudence and promulgated the standards for evaluating the constitutionality of informed consent statutes, with a focus on the landmark cases *Casey*[42] and *Carhart*.[43] Part IV discusses four federal circuit court opinions that have explicitly acknowledged the existence of confusion and inconsistency in courts' application of the undue burden standard.[44] Part IV then

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will operate as a substantial obstacle to a woman's choice to undergo an abortion.") (internal quotation marks omitted).

[40] *Id. See also* Vandewalker *supra* note 38, at 13–33.

[41] *Casey*, 505 U.S. at 986–97 ("The joint opinion explains that a state regulation imposes an undue burden if it has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus. An obstacle is substantial, we are told, if it is calculated, not to inform the woman's free choice, but to hinder it. This latter statement cannot possibly mean what it says. *Any* regulation of abortion that is intended to advance what the joint opinion concedes is the State's substantial interest in protecting unborn life will be calculated to hinder a decision to have an abortion. It thus seems more accurate to say that the joint opinion would uphold abortion regulations only if they do not *unduly* hinder the woman's decision. That, of course, brings us right back to square one: Defining an undue burden as an undue hindrance (or a substantial obstacle) hardly clarifies the test. Consciously or not, the joint opinion's verbal shell game will conceal raw judicial policy choices concerning what is 'appropriate' abortion legislation.")(Scalia, J. dissenting) (internal quotation marks omitted).

[42] *Casey*, 505 U.S. 833.

[43] Gonzalez v. Carhart, 550 U.S. 124 (2007).

[44] Memphis Planned Parenthood, Inc. v. Sundquist, 175 F.3d 456 (6th Cir. 1999); Karlin v. Foust, 188 F.3d 446 (7th Cir. 1999); Okpalobi v. Foster, 190 F.3d 337 (5th Cir. 1999) *on reh'g en banc*, 244 F.3d 405 (5th Cir. 2001); A Woman's Choice-E. Side Women's Clinic v. Newman, 305 F.3d 684 (7th Cir. 2002).

provides examples of confused, conflated and inconsistent application of the undue burden standard through an analysis of two recent circuit court cases.[45]

Lastly, Part V provides an in depth discussion of the proposed solution.[46] This section addresses why each of recommended adjustments to the standard is important, and why making all of these adjustments together is a better approach than making any one of them alone. Part V suggests that reformulating the standard with each of the proposed changes will generate an undue burden standard that allows the states to *appropriately* express their interest in potential life, while also adequately protecting women's right to terminate a pregnancy. This Comment concludes by briefly discussing the public policy perils of failing the reform the problematic undue burden standard, as well as the public policy benefits of adopting the proposed solution.

II. INFORMED CONSENT TO MEDICAL PROCEDURES

The central guiding principles of informed consent are patient autonomy and self-determination.[47] There are five elements to informed consent: (1) disclosure, (2) understanding, (3) voluntariness, (4) competence, and (5) consent.[48] This Comment focuses on disclosure and voluntariness, although the issue of competence becomes prominent in the abortion context with regard to the informed consent of minors attempting to obtain an abortion.[49]

Disclosure is the most pertinent element of informed consent for purposes of this Comment, as the majority of constitutional challenges to recent informed consent statutes focus

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[45] *See* cases cited *supra* note 7, pp. 1.
[46] *See supra* pp. 5–6.
[47] Hana Osman, *History and Development of the Doctrine of Informed Consent*, 4 INT'L ELECTRONIC J. OF HEALTH EDUC. 41, 44–45 (2001), http://www.aahperd.org/loader.cfm?csModule=security/getfile&pageid=39142 (last visited February 22, 2013).
[48] *Id.*
[49] *See, e.g.*, Causeway Med. Suite v. Ieyoub, 109 F.3d 1096 (5th Cir. 1997) *overruled by* Okpalobi v. Foster, 244 F.3d 405 (5th Cir. 2001) (during judicial bypass to parental consent or notification statutes burden is on minor to show that she is mature and well-informed or else that an abortion is in her best interests).

on provisions involving mandatory informational disclosures.[50] Within the disclosure element are three different standards of informed consent.[51] The first is the professional practice standard, which emphasizes the patients' best medical interests.[52] The reasonable person standard, on the other hand, places the most emphasis on patient autonomy and self-determination.[53] Finally, the subjective standard suggests that maximization of autonomy requires the quantity and quality of information to be tailored to each of the individual patients based on their needs.[54] The subjective standard is arguably preferable, but each of these standards has its respective strengths and weaknesses.[55]

Voluntariness is also critical to obtaining informed consent.[56] Voluntary agreement to a given treatment is central to patient autonomy and self determination, because patients are only able to make educated and rational decisions if they are not being manipulated, pressured, or coerced to elect an option to which they are resistant.[57] Though physicians will inevitably influence their patients' decisions to some degree, the process of informed consent fails if physicians coerce their patients to select a given course of treatment.[58] Manipulation can be considered a form of coercion in the context of informed consent because it diminishes the patients' capacity to arrive at intelligent and informed decisions.[59] As such, decisions that result

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[50] Roe, *supra* note 21, pp. 4. *See also* cases cited *supra* note 7, pp. 1.

[51] Osman, *supra* note 47, pp. 8 at 44–45 (2001), http://www.aahperd.org/loader.cfm?csModule=security/getfile&pageid=39142 (last visited February 22, 2013).

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] Hana Osman, *History and Development of the Doctrine of Informed Consent*, 4 INT'L ELECTRONIC J. OF HEALTH EDUC. 41, 44–45 (2001), http://www.aahperd.org/loader.cfm?csModule=security/getfile&pageid=39142 (last visited February 22, 2013)(*citing* EDMUND D. PELLEGRINO AND DAVID C. THOMASMA, THE VIRTUES IN MEDICAL PRACTICE. (New York: Oxford University Press. 1993)).

[58] *Id.*

[59] Ian Vandewalker, *Abortion and Informed Consent: How Biased Counseling Laws Mandate Violations of Medical Ethics*, 19 MICH. J. GENDER & L. 1, 36 (2012).

from the use of manipulative tactics do not meet the voluntariness requirement of informed consent because the decisions are not considered patients' own free choice.[60]

Today, most states' informed consent statutes have more stringent requirements for the abortion procedure than are required for any other medical procedure.[61] The provisions of informed consent statutes that apply to abortion are not only harsh and inflexible, some go as far as requiring misleading statements to be made to patients.[62] Under these statutes, states mandate the delivery of certain materials and information that they claim is essential to the process obtaining women's informed consent to an abortion.[63] In reality, however, these so-called informed consent laws undermine the goals of informed consent by disseminating false or incomplete information.[64] These so-called informed consent statutes, which are more accurately described as anti-abortion statutes, undermine the principle of patient autonomy and demote patient well being, the primary tenets and goals of informed consent.[65] Nevertheless, these anti-abortion laws are being passed by state legislatures under the guise of informed consent, and are being upheld by some courts under the protection of the amorphous undue burden standard.[66]

III. Evolution of Informed Consent Statutes for Abortion Procedures Through Supreme Court Jurisprudence

A. The Road To Casey

States' ability to regulate abortion through informed consent statutes has varied over the past forty years. The United States Supreme Court held in *Roe v. Wade*[67] that women's ability to

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[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] Vandewalker, *supra* note 59 at 45–49.
[66] *See, e.g.*, Planned Parenthood Minnesota, N. Dakota, S. Dakota v. Rounds, 686 F.3d 889 (8th Cir. 2012).
[67] 410 U.S. 113 (1973) *holding modified by Casey,* 505 U.S. 833.

choose whether to terminate their pregnancy is a fundamental right.[68] The Court balanced the competing interests of women and states, and adhered to the traditional Fourteenth Amendment practice of applying strict scrutiny to fundamental rights.[69] The result was the "trimester framework," which mandated *no interference whatsoever* from the state in the first trimester of women's pregnancies.[70] The trimester framework allowed limited regulation in the second trimester, permitting only regulation that was intended to preserve the life or health of women.[71] States had broadest authority to regulate the abortion procedure in the third trimester.[72] Under the trimester framework, states were permitted to enact statutes that regulated third trimester abortions if the statutes were designed to preserve the life or health of women *or* the potential life of the fetus.[73]

Despite the trimester framework's alleged prohibition of states' interference during the first trimester of women's pregnancies, the Court in *Planned Parenthood of Missouri v. Danforth*[74] upheld an informed consent statute for pre-viability abortion under *Roe*.[75] The Court's decision to uphold a statute requiring women to sign an informed consent form before obtaining a first-trimester abortion was the Supreme Court's first decision to uphold regulation during the first trimester through informed consent under *Roe*'s trimester framework.[76] Unaware of the floodgates that they were opening, the Court held that requiring written informed consent

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[68] *Id.* ("As recently as last Term, in Eisenstadt v. Baird we recognized the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child. That right necessarily includes the right of a woman to decide whether or not to terminate her pregnancy.") (citations and internal quotation marks omitted).
[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] *Id.*
[73] *Roe*, 410 U.S. 113 at 164–65.
[74] 428 U.S. 52 (1976).
[75] *Id.* at 67.
[76] *See supra* note 70, pp. 10.

to abortion was no different than requiring informed consent for any other medical procedure.[77] Further, they opined that this holding did not single out the abortion procedure, but rather included it among all other medical procedures for which informed consent was required.[78] This was also the first case in which the Court suggested that, due to the nature of the abortion decision, the state has an interest in ensuring the decision is fully informed.[79]

A few years later, in *City of Akron v. Akron Center for Reproductive Health, Inc.*,[80] the Court acknowledged states' interest in ensuring that women's decisions are informed, as described in *Danforth*, but struck down the informed consent provision on the grounds that it was an unconstitutional violation of women's Fourteenth Amendment right to and abortion.[81] The Court held that the informed consent provision was invalid because it did not give physicians adequate discretion to determine what information to tell patients, considering their specific, individual circumstances.[82] The Court also concluded that the statute was impermissibly attempting to persuade women to continue their pregnancies.[83]

Though the majority in *Akron* struck down the informed consent provision on Fourteenth Amendment grounds, the Court suggested in dicta that informed consent statutes can violate the

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[77] *Danforth*, 428 U.S. at 67.
[78] *Id.*
[79] *Id.* ("The decision to abort, indeed, is an important, and often a stressful one, and it is desirable and imperative that it be made with full knowledge of its nature and consequences. The woman is the one primarily concerned, and her awareness of the decision and its significance may be assured, constitutionally, by the State to the extent of requiring her prior written consent.").
[80] 462 U.S. 416 (1983) *overruled by* Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833 (1992).
[81] *Id.* at 443.
[82] *Id.* ("It remains primarily the responsibility of the physician to ensure that appropriate information is conveyed to his patient, depending on her particular circumstances. Danforth's recognition of the State's interest in ensuring that this information be given will not justify abortion regulations designed to influence the woman's informed choice between abortion or childbirth.").
[83] *Id.* at 444. (holding that the statute "attempts to extend the State's interest in ensuring 'informed consent' beyond permissible limits" because "the information required is designed not to inform the woman's consent but rather to persuade her to withhold it altogether.").

First Amendment as well.[84] This serves as an interesting point of reference, because while the Court here was only beginning to consider the First Amendment implications of informed consent statutes, informed consent statutes are repeatedly challenged on both First Amendment and Fourteenth Amendment grounds today.[85] While questions regarding the interaction of the First and Fourteenth Amendment analysis of informed consent statutes sprouted from the majority's dicta, the dissenting opinion seems to have planted the seed for the undue burden standard.[86] The dissent proposed the undue burden standard as a possible analytical framework for abortion cases, but also suggested that deference to legislative determinations regarding whether a given regulation is "unduly burdensome" is not appropriate.[87]

Another informed consent statute was held invalid in *Thornburgh v. American College of Obstetricians and Gynecologists,*[88] under similar reasoning as that expressed in *Akron.*[89] Citing *Akron,* the Court again ruled on Fourteenth Amendment grounds, striking the informed consent

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[84] *Id.* at 472 ("This is not to say that the informed consent provisions may not violate the First Amendment rights of the physician if the State requires him or her to communicate its ideology. However, it does not appear that Akron Center raised any First Amendment argument in the Court below.").

[85] *See, e.g.,* Planned Parenthood Minnesota v. Rounds, 467 F.3d 716 (8th Cir. 2006) *and* Planned Parenthood Minnesota, N. Dakota, S. Dakota v. Rounds, 686 F.3d 889 (8th Cir. 2012)(both brought First and Fourteenth Amendment challenges). *Compare* Texas Med. Providers Performing Abortion Services v. Lakey, 667 F.3d 570 (5th Cir. 2012)(brought only First Amendment challenges, but court still discussed undue burden).

[86] *Akron,* 462 U.S. at 453. ("In my view, this 'unduly burdensome' standard should be applied to the challenged regulations throughout the entire pregnancy without reference to the particular 'stage' of pregnancy involved. If the particular regulation does not 'unduly burden' the fundamental right, then our evaluation of that regulation is limited to our determination that the regulation rationally relates to a legitimate state purpose.")(internal citations omitted).

[87] *Akron,* 462 U.S. at 465. ("The 'unduly burdensome' standard is appropriate *not* because it incorporates deference to legislative judgment at the threshold stage of analysis, but rather because of the limited *nature* of the fundamental right that has been recognized in the abortion cases. Although our cases do require that we 'pay careful attention' to the legislative judgment before we invoke strict scrutiny, it is not appropriate to *weigh* the state interests at the threshold stage.")(internal citations omitted).

[88] 476 U.S. 747 (1986) *overruled by* Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833 (1992).

[89] *Id.* at 764. (The statute required "that the woman be informed by the physician of 'detrimental physical and psychological effects' and of all 'particular medical risks' compound the problem of medical attendance, increase the patient's anxiety, and intrude upon the physician's exercise of proper professional judgment. This type of compelled information is the antithesis of informed consent. That the Commonwealth does not, and surely would not, compel similar disclosure of every possible peril of necessary surgery or of simple vaccination, reveals the anti-abortion character of the statute and its real purpose. Pennsylvania, like Akron, 'has gone far beyond merely describing the general subject matter relevant to informed consent.' In addition, the Commonwealth would require the physician to recite its litany 'regardless of whether in his judgment the information is relevant to [the patient's] personal decision.' These statutory defects cannot be saved by any facts that might be forthcoming at a subsequent hearing.").

provision down due to the specific and, in the Court's opinion, irrelevant information that the statute required.[90] The dissenting opinion in *Thornburgh* also expressly addressed the potential First Amendment implications of these informed consent statutes, but contrary to the dissent in *Akron,* suggested that regulations should be evaluated using rational basis review under which the states are afforded a heavy dose of deference.[91]

Though the dissenting opinions in the aforementioned cases introduced the possibility of adopting a new standard for evaluating the constitutionality of statutes that regulate abortion, *Webster v. Reproductive Health Services*[92] was really the beginning of the end of *Roe.*[93] The constitutionality of the informed consent provision of the statute at issue in this case did not come before the Court because the state did not raise the issue on appeal, but the Court's general discussion in this case made it abundantly clear that the trimester framework would soon be abolished.[94] Not only did the Court explicitly express the intent to abandon the trimester framework, it also used suggested that state's interest in potential life begins at conception.[95] This opinion sets the stage perfectly for *Casey* and the abandonment of the trimester framework.[96] Interestingly, however, even in a case that so clearly set the stage for *Casey*, the Court's dicta suggested that a provision of that statute, which was comparable to the speech-and-display ultrasound requirements that have been appearing in recent informed consent statutes,

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[90] *Id.* at 830. (Addressing the First Amendment issue, the Court wrote, "I do not dismiss the possibility that requiring the physician or counselor to read aloud the State's printed materials if the woman wishes access to them but cannot read raises First Amendment concerns. Even the requirement that women who can read be informed of the availability of those materials, and furnished with them on request, may create some possibility that the physician or counselor is being required to 'communicate [the State's] ideology.'").

[91] *Id.* at 789–90.

[92] 492 U.S. 490 (1989).

[93] *See supra* note 86, pp. 13.

[94] *Webster*, 492 U.S. at 518.

[95] *Id.* ("This Court has emphasized that Roe implies no limitation on a State's authority to make a value judgment favoring childbirth over abortion, and the preamble can be read simply to express that sort of value judgment . . . There is also no reason why the State's compelling interest in protecting potential human life should not extend throughout pregnancy rather than coming into existence only at the point of viability. Thus, the Roe trimester framework should be abandoned.").

[96] *Id.*

would have violated the physician's First Amendment right to free speech through content-based regulation of speech.[97]

B. Planned Parenthood of Southeastern Pennsylvania v. Casey

The Supreme Court's opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*[98] began with the memorable line,"[l]iberty finds no refuge in a jurisprudence of doubt."[99] Ironically, however, the *Casey* plurality opinion introduced a standard that has created tremendous doubt and ambiguity an already confused and controversial abortion jurisprudence.[100] In one foul swoop, the Supreme Court (1) manipulated the essential holdings of *Roe v. Wade* to include the word "undue," which allowed for exponentially more regulation of abortion,[101] (2) disposed of the trimester framework and the application of strict scrutiny to the statutes that regulate abortion,[102] (3) overturned *Akron*[103] and *Thornburgh*[104], which held that abortion informed consent laws cannot intentionally influence a woman's choice,[105] and (4) neglected to apply the *Salerno*[106] standard for facial challenges.[107]

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[97] *Id.* at 512. ("In a separate opinion, Judge Arnold argued that Missouri's prohibition violated the First Amendment because it 'sharply discriminate[s] between kinds of speech on the basis of their viewpoint: a physician, for example, could discourage an abortion, or counsel against it, while in a public facility, but he or she could not encourage or counsel in favor of it.'").

[98] 505 U.S. 833 (1992).

[99] *Id.* at 844.

[100] *See, e.g.,* Texas Med. Providers Performing Abortion Services v. Lakey, 667 F.3d 570, 585 (5th Cir. 2012) ("Today we abide *Casey,* whose force much of the argument here fails to acknowledge. It bears reminding that *Roe* survived *Casey* only in a recast form . . . We must and do apply today's rules as best we can without hubris and with less sureness than we would prefer. . . .").

[101] *Casey,* 505 U.S. at 954 ("Whatever the 'central holding' of *Roe* that is left after the joint opinion finishes dissecting it is surely not the result of that principle. While purporting to adhere to precedent, the joint opinion instead revises it. *Roe* continues to exist, but only in the way a storefront on a western movie set exists: a mere facade to give the illusion of reality.")(Rehnquist, J., dissenting).

[102] *Id.* at 993 ("It seems particularly ungrateful to carve the trimester framework out of the core of *Roe,* since its very rigidity (in sharp contrast to the utter indeterminability of the 'undue burden' test) is probably the only reason the Court is able to say, in urging *stare decisis,* that *Roe* 'has in no sense proven unworkable,'") (internal quotation marks omitted).

[103] City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416 (1983).

[104] Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747 (1986).

[105] *See Akron,* 462 U.S. at 442–449 *and Thornburgh,* 476 U.S. at 760 ("[W]e have consistently rejected state efforts to prejudice a woman's choice, either by limiting the information available to her, or by 'requir[ing] the delivery of

1. The Undue Burden Standard

The undue burden standard was set forth in the plurality opinion of *Casey*.[108] In the most complete articulation of the standard in the disjointed plurality opinion, the Court explained:

> "A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus. A statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it. And a statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends."[109]

This explanation, however, is circular, and fails to adequately define the key terms that, together, compose this standard.[110] Instead of offering any clear definitions or objective criteria, the plurality attempted to clarify the standard by providing hypothetical examples of what it might have considered an undue burden, and what it would not.[111] These examples, many of

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information designed 'to influence the woman's informed choice between abortion or childbirth.'")(internal citations omitted).

[106] United States v. Salerno, 481 U.S. 739 (1987).

[107] *Casey*, 505 U.S. 833, 941–42 (1992) ("THE CHIEF JUSTICE then further weakens the test by providing an insurmountable requirement for facial challenges: Petitioners must 'show that no set of circumstances exists under which the [provision] would be valid.' In short, in his view, petitioners must prove that the statute cannot constitutionally be applied to *anyone*.") (internal citations omitted). The "insurmountable requirement" the Chief Justice had suggested is the *Salerno* standard, which is the traditional standard for facial challenges, but which has since been replaced by the undue burden standard articulated in *Casey* in the abortion context. *See* Fargo Women's Health Org. v. Schafer, 18 F.3d 526, 529 (8th Cir. 1994) ("[T]he facial challenge standard should include a factual inquiry in abortion regulation cases. Justice O'Connor wrote: 'In striking down the Pennsylvania law, we did not require [plaintiffs] to show that the provision would be invalid in *all* circumstances.' Justice O'Connor, joined by Justice Souter, emphasized that a law constitutes an 'undue burden,' and is therefore invalid, if 'in a large fraction of the cases in which [the law] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion.'") (internal citations omitted). *See also* Karlin v. Foust, 188 F.3d 446, 483 (7th Cir. 1999) ("In *Casey*, the Court appears to have tempered, if not rejected, *Salerno*'s stringent "no set of circumstances" standard in the abortion context, without expressly saying so.").

[108] *Id.* at 877.

[109] *Id.*

[110] *See supra* note 41, pp. 7 and accompanying text.

[111] *Id. See generally Casey*, 505 U.S. 876–902.

which will be discussed briefly here, were offered in a disjointed, piecemeal discussion of the standard in what amounted to a seventy-page decision.[112]

The "substantial obstacle" inquiry is a disjunctive test with two parts: purpose and effect.[113] Under this test, a statute is unconstitutional if it *either* was intended to present a substantial obstacle (purpose), *or*, despite the integrity of its purpose, if it has the effect of presenting a substantial obstacle to women seeking to exercise their right to an abortion.[114] The "purpose" inquiry can be further deconstructed, to the question of whether the statute has been calculated to inform or, instead, to hinder women's decisions.[115]

Statutes present an unconstitutional undue burden if the measures chosen by states are "calculated to hinder" women's free choice.[116] When evaluating whether statutes are calculated to hinder women's free choice or not, the analysis must be centered on those who are actually affected by the restriction.[117] If a statute imposes a more stringent requirement upon minors seeking an abortion, for example, the focus of the inquiry is how *that class of minors* is affected; it wouldn't matter if the class of minors comprised only a small proportion of the total group of women seeking abortions.[118] The Supreme Court explained that lower courts should engage in an analysis led by facts, studies, testimony, and common sense to determine if, *of the women*

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[112] *Id.*
[113] *Id.* at 877.
[114] *Id.*
[115] *Id.*
[116] *Id.*
[117] *Casey*, 505 U.S. at 894 ("[T]he proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant.").
[118] *Id.*

affected by the statute, it would act as a substantial obstacle in a "large fraction"[119] of those cases.[120]

The Court gave two examples of cases in which statutes would *hinder* women's free choice, and therefore have an impermissible purpose.[121] First, the Court explained, unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to women seeking an abortion impose an undue burden and are unconstitutional.[122] Unfortunately, the Court did not shed any light on what is considered an "unnecessary" health regulation, nor did it give an explanation of when or how an "unnecessary" health regulation could be calculated to inform a woman's choice.[123] The Court stopped short of saying outright that if a health regulation is unnecessary, it is calculated to hinder a woman's choice, although that is arguably the only reasonable inference.[124]

Statutes that strip women of the ability to make the decision to have an abortion before their pregnancies proceed beyond the point of viability would also fit the Court's paradigm of statutes that are calculated to hinder women's choice.[125] This implicitly suggests that states may prohibit women from making the ultimate decision to terminate their pregnancies *after* viability.[126] This was true even under Roe's trimester framework.[127] This also imprudently

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[119] At least one court has struggled to determine when a group becomes a "large fraction" such that the effect of the statute would warrant invalidating the statute. *See* A Woman's Choice-E. Side Women's Clinic v. Newman, 305 F.3d 684, 699 (7th Cir. 2002).

[120] *Casey*, 505 U.S. at 925 ("Looking at this group, the Court inquires, based on expert testimony, empirical studies, and common sense, whether 'in a large fraction of the cases in which [the restriction] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion.' 'A statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it.'")(internal citations omitted).

[121] *Id.* at 878.

[122] *Id.*

[123] *Id.*

[124] *Id*

[125] *Id.* at 879.

[126] *Casey*, 505 U.S. at 879. *See also* Roe v. Wade, 410 U.S. 113, 114 (1973) ("For the stage subsequent to viability the State, in promoting its interest in the potentiality of human life, may, if it chooses, regulate, and even proscribe, abortion except where necessary, in appropriate medical judgment, for the preservation of the life or health of the

implies that states may prohibit women from making *the earliest possible* decision to terminate her pregnancy, as long as the ultimate decision is theirs.[128] It was imprudent of the Court to neglect to address this inference because it makes it impossible to distinguish statutes that unconstitutionally "hinder" women from obtaining abortions, from those that constitutionally delay them, since to hinder is, by definition, "to cause delay, interruption or difficulty in."[129]

Nevertheless, this rationale led the Court to uphold the twenty-four hour mandatory waiting period at issue in the case.[130] The Court opined that requiring a woman to wait at least twenty-four hours between being given certain information and having an abortion is not a substantial obstacle.[131] The Plaintiffs had presented the Court with evidence that the mandated twenty-four hours waiting period often resulted in a delay of a week or more before women could obtain the procedure.[132] Despite having emphasized the importance of implementing a highly factual analysis involving testimony and studies in earlier parts of the opinion, the Court failed to engage in a highly factual analysis on the real effects of the waiting period.[133] Instead the Court insensitively, or perhaps unknowingly, made light of this waiting period, without giving any recognition or acknowledgement to the prolonged difficulties and discomforts of pregnancy that the women had to endure during the mandatory waiting period.[134]

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mother."). Sadly, the protections of the trimester framework have been abandoned, but the ability to hinder women from choosing an abortion is part of little binding precedent that has remained of the holding in *Roe*.

[127] *Id.*

[128] *Id. at* 885–888.

[129] *Hinder Definition*, DICTIONARY.COM, http://dictionary.reference.com/browse/hinder?s=t (last visited Mar. 1, 2013)

[130] *Id.*

[131] *Id.*

[132] *Id.* at 921 ("While a general requirement that a physician notify her patients about the risks of a proposed medical procedure is appropriate, a rigid requirement that all patients wait 24 hours or (what is true in practice) much longer to evaluate the significance of information that is either common knowledge or irrelevant is an irrational and, therefore, 'undue' burden.") (Stevens, J., dissenting).

[133] *Id.*

[134] *Id.*

The Court also offered examples of statutes the Court would find to be calculated to *inform* women's free choice, and therefore be constitutional.[135] First, the Court would find statutes that require information that is truthful, non-misleading, and relevant to the decision to have an abortion to be calculated to inform women's choice.[136] Unfortunately, no guidelines were supplied that would instruct lower courts how to determine whether the given information is truthful, non-misleading, and relevant.[137] While the question of truth may seem easy to discern, it can become quite difficult in the face of disputed medical and scientific evidence.[138] The Court, evidently, did not consider the possibility of inconclusive or disputed medical authority, or the potential for states to exaggerate the credibility of ill-supported studies and information when promulgating the undue burden standard.[139] Determining when information is misleading, despite its veracity, is an entirely separate concern that went unaddressed by the Court. For example, truthful information can often be misleading when taken out of context. This omission has led some lower courts to automatically conclude that if information is truthful, it is therefore non-misleading, which is certainly not always true.[140]

Next, the Court explained that states are free to enact measures that are intended to persuade a woman to choose childbirth over abortion, even if the measures do not further a health interest.[141] In other words, the Court implied that unnecessary health regulations are acceptable, so long as they do not have the effect of placing a substantial obstacle in the way of

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[135] *Casey*, 505 U.S. 833, 882 (1992).
[136] *Id.* ("If the information the State requires to be made available to the woman is truthful and not misleading, the requirement may be permissible. We also see no reason why the State may not require doctors to inform a woman seeking an abortion of the availability of materials relating to the consequences to the fetus, even when those consequences have no direct relation to her health...informed choice need not be defined in such narrow terms that all considerations of the effect on the fetus are made irrelevant.").
[137] *Id.*
[138] *See generally supra* note 38, pp. 6–7.
[139] *Id.*
[140] Texas Medical Providers Performing Abortion Services v. Lakey, 667 F.3d 570, 577–78 (5th Cir. 2012). *See also supra* note 38, pp. 6–7.
[141] *Casey*, 505 U.S. at 886.

the woman seeking an abortion.[142] While this explanation was presumably intended to inform courts of when a state regulation is permissible, it directly contradicts the Court's previous proclamation, that unnecessary health regulations that impose a substantial obstacle unconstitutionally hinder women's right to an abortion.[143] The trouble is that the Court did sufficiently explain when a permissible obstacle becomes a "substantial obstacle."[144] Thus, lower courts are required to engage in a factual analysis, but are not given any instruction on how to weigh the facts or how to determine when something is a permissible burden or impermissible substantial obstacle and thus, an unconstitutional undue burden.[145]

Again, while the Court stresses that states may persuade women to choose childbirth but may not impose an undue burden on their right to choose, it is almost impossible to determine whether statutes are successfully persuading women to choose childbirth or, rather, unconstitutionally hindering women from obtaining abortions.[146] If statutes are designed to persuade women to choose childbirth over abortion, success in achieving that goal would be measured by a reduction in the rate of abortions. The Court has said, however, that a decrease in "a large fraction" of women having an abortion is evidence that the regulation was calculated to hinder, not inform the woman's choice.[147] The fact that one result can be used to measure the success of a permissible goal *or* to demonstrate an impermissible purpose is highly problematic.

The Court briefly explained, on the one hand, that simply making an abortion more costly or more difficult is not, in itself, an undue burden.[148] On the other hand, the Court held that

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[142] *Id.*
[143] *Id.* at 878.
[144] *Id.* at 965.
[145] *Id. See also* Karlin v. Foust, 188 F.3d 446, 480 (7th Cir. 1999) ("When is a burden 'undue' as opposed to merely incidental?").
[146] *Casey*, 505 U.S. at 965.
[147] *Id.* at 925.
[148] *Casey*, 505 U.S. 833, 874 ("Numerous forms of state regulation might have the incidental effect of increasing the cost or decreasing the availability of medical care, whether for abortion or any other medical procedure. The fact

statutes that prevent a "large fraction" of women from exercising their right to an abortion *do* create an undue burden.[149] There is, of course, a broad range of effects between these two that the Court did not address, leaving a grey area for lower courts attempting to determine whether statutes present an undue burden. Without any guidance as to how to navigate that grey area, one approach has been to place the threshold at the latter and hold that as long as statutes do not virtually ban abortions for the women affected, they are permissible.[150] This cannot be what the Court intended, however, as such an interpretation would simply be a reiteration of the holding in *Roe*.[151] Unfortunately, lower courts are left guessing at where the Court intended the line to be drawn.

The Court went on to explain "a state measure designed to persuade [a woman] to choose childbirth over abortion will be upheld if reasonably related to that goal."[152] The Court discussed two objectives upon making this statement: (1) allowing states, parents, and guardians to express their "profound respect" for fetal life, and (2) persuading women to choose childbirth over abortion.[153] By using the words "that goal" it is unclear whether the Court is referring to respect for fetal life, or whether the statement can be read to mean that any state measure reasonably related to persuading a woman to choose childbirth over abortion will be upheld, so long as it is

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that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect *of* making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it. Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause.").

[149] *Id.* at 925.

[150] Karlin v. Foust, 188 F.3d 446, 480 (7th Cir. 1999).

[151] Roe v. Wade, 410 U.S. 113,153–57 (1973). *See also Casey* 505 U.S. at 926 (Justice Blackmun stating that he was "confident that in the future evidence will be produced to show that 'in a large part of the cases in which [these regulations are] relevant, [they] will operate as a substantial obstacle to a woman's choice to undergo an abortion.'") (Blackmun, J., concurring in part and dissenting in part) (quoting joint opinion, 505 U.S. at 895).

[152] *Casey*, 505 U.S. at 877–78 ("Regulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose. Unless it has that effect on her right of choice, a state measure designed to persuade her to choose childbirth over abortion will be upheld if reasonably related to that goal. Regulations designed to foster the health of a woman seeking an abortion are valid if they do not constitute an undue burden.") (internal citations omitted).

[153] *Id.* at 878.

not a "substantial obstacle."[154] Considering the huge ambiguity regarding the meaning of "substantial obstacle," courts can only hope the latter was not the intended meaning.[155]

While the Court spent considerable time discussing the "purpose" prong of the "undue burden standard," it provided even less guidance with regard to the "effect" prong.[156] To clarify the "effect" prong, the Court merely explained that a regulation is unconstitutional if it is a substantial obstacle to the woman's exercise of the right to choose in a "large fraction" of the cases in the group for whom the law is a restriction.[157] Unfortunately, the "effect" prong suffers from the same lack of clarity and definitions as the "purpose" prong. This is concerning, since, without further guidance, there is almost unfettered discretion bestowed upon courts in deciding whether the effect of a given regulation is "substantial" or not.[158]

2. The Dissenting Opinions in Casey

The Justices who dissented in *Casey* recognized that the standard, as promulgated, was ambiguous and would be impossible for the lower courts to apply consistently.[159] The first indication that this standard is flawed lies in the fact that it was a plurality opinion, with four independently written dissenting opinions in which six Justices partook.[160] The Justice's qualms with this amorphous standard were made very clear in their dissents; the most vehement dissent being authored by Justice Scalia.[161]

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[154] *Id.*
[155] *Id.* at 965.
[156] *Id.* at 877–79, 885–97.
[157] *Id.* at 965.
[158] *See supra* note 143, pp. 22, and *infra* note 161.
[159] *See infra* notes 160–61, pp. 24.
[160] Casey v. Planned Parenthood of Se. Pennsylvania, 14 F.3d 848, 854 (3d Cir. 1994) ("The joint opinion of Justices O'Connor, Kennedy and Souter provides the narrowest grounds for the judgments in which various other Justices concurred to form majorities on different issues. Under the rule of *Marks, supra* note 3, the joint opinion is therefore cited for the holdings of the Court.").
[161] *Casey*, 505 U.S. 833, 979–1002 (1992).

Justice Scalia maintained that the joint opinion failed to sufficiently clarify the undue burden standard, and that its failed attempt only demonstrated further that the standard is unworkable and easy to manipulate.[162] Justice Scalia then engaged in a discussion about the problems that lower courts attempting to apply this standard would likely encounter in the future.[163] The Justice acknowledged the incredible difficulty in determining when a burden becomes a "substantial burden," and argued that this ambiguity invites judges to draw subjective conclusions and use personal opinions to shape their analysis.[164] Justice Scalia predicted there would be a number of conflicting opinions trying to interpret the undue burden standard as it was set forth by the plurality opinion.[165] Justice Scalia also suggested that the differing conclusions of the plurality and dissenters regarding whether or not the provisions at issue were "substantial obstacles" exemplified this point.[166]

*C. Relevant Post-*Casey *Precedent*

In *Stenberg v. Carhart*,[167] the Court did not evaluate the constitutionality of informed consent statutes, but this case is important in understanding the development of abortion jurisprudence in the context of informed because it evinces the Court's slow but continuous shift of deference away from physicians and toward the state.[168] The dissenting opinion analogized the majority's reasoning to that of *Akron*, but disapprovingly called the majority opinion

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[162] *Id.* at 985–86.
[163] *Id.* at 984–93.
[164] *Id.* at 992. *See also id.* at 965 ("In that this standard is based even more on a judge's subjective determinations than was the trimester framework, the standard will do nothing to prevent 'judges from roaming at large in the constitutional field' guided only by their personal views.'") (*citing* Griswold v. Connecticut, 381 U.S. 479, ,502 (1965)) (Harlan, J., concurring in judgment).
[165] *Id.* at 965 ("Because the undue burden standard is plucked from nowhere, the question of what is a 'substantial obstacle' to abortion will undoubtedly engender a variety of conflicting views.").
[166] *Id.* at 985–87.
[167] 530 U.S. 914 (2000).
[168] *Id.* at 971 (discussing Jacobson v. Massachusetts, 197 U.S. 11 (1905) to support the proposition that there exists "beyond doubt the right of the legislature to resolve matters upon which physicians disagreed").

physician-deferential.[169] The dissent also argued that the state should be able to take a position when medical authorities are in disagreement, and that the Court should defer to the legislature's position in such cases.[170] The danger in adopting the dissent's position, however, is that it allows legislatures, which undeniably have a political agenda, to manipulate and misconstrue medical findings and facts.[171]

The final relevant precedent in understanding the way abortion jurisprudence has shaped informed consent statutes is *Gonzales v. Carhart*.[172] The Court in *Gonzales* essentially adopted the position that the dissent discussed in *Stenberg* and adopted a standard of granting deference to legislative fact-finding as opposed to the weight of the medical evidence.[173] Importantly, however, the Court stopped short of granting states complete and unfettered discretion, and explained that the Court has the duty to engage in its own evaluation of both the law and the facts where fundamental constitutional rights are involved, and especially where district court

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[169] *Id.* at 969 ("The Court's decision today echoes the *Akron* Court's deference to a physician's right to practice medicine in the way he or she sees fit. The Court, of course, does not wish to cite *Akron;* yet the Court's holding is indistinguishable from the reasoning in *Akron* that *Casey* repudiated. No doubt exists that today's holding is based on a physician-first view which finds its primary support in that now-discredited case.").

[170] *Id.* at 970 ("The Court fails to acknowledge substantial authority allowing the State to take sides in a medical debate, even when fundamental liberty interests are at stake and even when leading members of the profession disagree with the conclusions drawn by the legislature. In Kansas v. Hendricks, 521 U.S. 346, 117 S.Ct.2072, 138 L.Ed.2d 501 (1997), we held that disagreements among medical professionals 'do not tie the State's hands in setting the bounds of ... laws. In fact, it is precisely where such disagreement exists that legislatures have been afforded the widest latitude.' *Id.*, at 360, n. 3, 117 S.Ct. 2072. Instead, courts must exercise caution (rather than require deference to the physician's treatment decision) when medical uncertainty is present.")

[171] See generally Joerg Dreweke and Rebecca Wind, *State Mandated Aborion Counseling Materials Often Medically Inaccurate, Biased*, (October 26, 2006), http://www.guttmacher.org/media/nr/2006/10/26/index.html citing Chinué Turner Richardson and Elizabeth Nash, *Misinformed Consent: The Medical Inaccuracy of State-Developed Abortion Counseling Materials*, 9 GUTTMACHER POLICY REVIEW 4 (2006), http://www.guttmacher.org/pubs/gpr/09/4/gpr090406.html.

[172] 550 U.S. 124 (2007).

[173] *Id.* at 163 ("The question becomes whether the Act can stand when this medical uncertainty persists. The Court's precedents instruct that the Act can survive this facial attack. The Court has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty.").

testimony demonstrated its falseness of legislative findings.[174] Naturally, the dissent in *Gonazles* criticized the majority for being overly deferential to the legislature.[175]

IV. ABORTION CONFUSION: CIRCUIT COURTS STRUGGLE WITH AMBIGUOUS UNDUE BURDEN STANDARD, FIRST AMENDMENT CHALLENGES, AND INCREASINGLY MANIPULATIVE INFORMED CONSENT STATUTES

A number of circuit courts that have applied the undue burden standard to abortion informed consent statutes have echoed Justice Scalia's concerns, demonstrating that the obscurity of the undue burden standard has presented the circuit courts with an incredible challenge.[176] For example, the Sixth Circuit, in *Memphis Planned Parenthood, Inc. v. Sundquist*,[177] expressly acknowledged that judges can and, in fact, do disagree regarding the point at which a burden becomes an unconstitutional "undue burden."[178] The author of the concurrence did not seem to find this troubling, commenting that this was not surprising given the subjective nature of the standard.[179] The dissent in *Memphis*, on the other hand, found this to be very troublesome, and agreed with Justice Scalia that the undue burden standard was manipulable.[180]

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[174] *Id.* at 165–66 ("Although we review congressional fact-finding under a deferential standard, we do not in the circumstances here place dispositive weight on Congress' findings. The Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake ... As respondents have noted, and the District Courts recognized, some recitations in the Act are factually incorrect ... Uncritical deference to Congress' factual findings in these cases is inappropriate.")

[175] *Id.* at 175 ("The trial courts concluded, in contrast to Congress' findings, that 'significant medical authority supports the proposition that in some circumstances, [intact D & E] is the safest procedure ... Today's opinion supplies no reason to reject those findings. Nevertheless, despite the District Courts' appraisal of the weight of the evidence, and in undisguised conflict with *Stenberg*, the Court asserts that the Partial-Birth Abortion Ban Act can survive 'when ... medical uncertainty persists.' This assertion is bewildering. Not only does it defy the Court's longstanding precedent affirming the necessity of a health exception, with no carve-out for circumstances of medical uncertainty; it gives short shrift to the records before us, carefully canvassed by the District Courts.") (internal citations omitted).

[176] *See supra* note 44, pp. 7.

[177] 175 F.3d 456 (6th Cir. 1999).

[178] *Id.* at 467.

[179] *Id.*

[180] *Id.* at 468. ("Regardless of where an individual stands on the controversial topic of a woman's right to undergo an abortion, including the right of a minor female to do so without parental consent, this is, in fact, the state of law which this court is obligated to follow. However, in reversing the district court's imposition of a preliminary injunction against the enforcement of Tennessee's Parental Consent for Abortions by Minors Act of 1995,

The dissent accused the majority of engaging in an incorrect analysis under an improper standard of review, thereby neglecting its responsibility to adhere to Supreme Court precedent.[181] The dissent even accused the majority of deliberately ignoring some of the district court's factual findings in order to substitute its own judgment.[182]

In another case, *Karlin v. Foust,*[183] the court's bewilderment began as it attempted to distinguish between a burden that is "undue" and one that is merely "incidental."[184] The Seventh Circuit struggled to make sense of the undue burden standard, finally concluding that a burden that only *persuades* women is acceptable.[185] A burden is only undue, the court concluded, if *actually prevents* women from obtaining an abortion that they would have otherwise had.[186] In this court's opinion, incidental increase in cost or inconvenience of obtaining an abortion does not present an undue burden in and of itself; that increase in cost or inconvenience would have to rise to the level of actually preventing women from having access to an abortion before it would become an unconstitutional undue burden.[187] The court only upheld the disclosure at issue,

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Tenn.Code Ann. §§ 37–10–301 to –307 and Tennessee Supreme Court Rule 24 (collectively "the Act"), the majority engages in an inappropriate analysis under an erroneous standard of review, thereby disavowing its obligation to follow the law and Supreme Court precedent. The majority's decision turns *Roe, Bellotti II, Casey,* and their progeny on their heads inasmuch as the statutory requirements imposed by the Tennessee legislature make it a practical impossibility for a minor to obtain an abortion without first consulting or notifying a parent to seek the parent's permission. That is to say, the majority's overreaching holding effectively nullifies a minor female's right to choose to terminate her pregnancy without parental consent as guaranteed to her by the Constitution and Supreme Court precedent, because to say that the minor female has the right to have an abortion without parental consent as long as she overcomes extreme logistical hurdles is to say that she has no right at all.").

[181] *Id.* at 470.

[182] *Id.* ("The majority conspicuously fails to note those specific findings of fact upon which the district court concluded that the twenty-four hour notice of appeal filing requirement imposed an undue burden on female minors such that the provision would likely be found unconstitutional. The majority's calculated decision to ignore the district court's specific factual findings in all likelihood results from the majority's desire to improperly substitute *its* judgment for that of the district court, and the majority could not do so without engaging in an improper standard of review or risk exposing its self-serving purpose. As such, I specifically note the district court's findings which are an accurate and realistic determination of the logistical hurdles faced by these female minors in securing an abortion without parental knowledge, as well as the court's proper conclusions of law.").

[183] Karlin v. Foust, 188 F.3d 446 (7th Cir. 1999).

[184] *Id.* at 480.

[185] *Id.*

[186] *Id.*

[187] *Id.* at 482.

however, after concluding that the disclosure provision of the informed consent statute could be construed to mandate only a *topic* of discussion, of which the physician could tailor the content based on his best medical judgment and the particular circumstances of the woman.[188] The court cautioned against incorporating mandatory disclosures of *specific* information that limit physicians' discretion and medical judgment.[189]

Years after *Karlin*, lower courts continue to express uncertainty and insecurity in applying the undue burden standard. The *Okpalobi v. Foster*[190] case reveals puzzlement with regard to *when* courts are permitted to apply the undue burden standard.[191] The Fifth Circuit struggled with the "purpose" prong of the analysis, and commented that the plurality in *Casey* neglected to provide adequate guidance as to how lower courts should conduct that portion of the analysis.[192] In attempting to apply the undue burden standard and engage in the "purpose" prong of the analysis, the court concluded that a legislature does not have to expressly admit to an improper purpose in order for courts to find one, and that courts should consider "indicia of improper legislative purpose, such as statutory language, legislative history and context, and related legislation" in its "purpose" analysis.[193] The dissent agreed that the law had an impermissible purpose, and objected on other grounds.[194]

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[188] *Id.* at 473.

[189] *Id.* ("While AB 441 does strictly require that physicians must provide their patients with information on a number of specific topics, the district court's interpretation of the informed consent requirements allows the physician to use his or her best medical judgment in determining the exact nature or content of that information.").

[190] 190 F.3d 337, 354 (5th Cir. 1999) *on reh'g en banc*, 244 F.3d 405 (5th Cir. 2001).

[191] *Id.* at 354.

[192] *Id.* ("The *Casey* Court provided little, if any, instruction regarding the type of inquiry lower courts should undertake to determine whether a regulation has the 'purpose' of imposing an undue burden on a woman's right to seek an abortion.").

[193] *Id.*

[194] *Id.* at 361 ("I respectfully dissent because of the elementary and fundamental errors that the majority has made in its reaction to a statute plainly aimed at making medical practice more difficult for abortion doctors. The statute may well constitute an unfair legislative act, but that legislative unfairness cannot be corrected by an unconstitutional judicial act. In sum, this case presents no case or controversy under Article III of the Constitution and, consequently, we have no constitutional authority to decide its merits.").

On rehearing en banc, the court reached almost exactly the opposite result.[195] The majority concluded that the court lacked Article III jurisdiction and that the matter extended beyond the scope of their powers.[196] The dissent, however, argued that injunctive relief was the traditional avenue of recourse for facial challenges to abortion statutes, citing *Casey* and a number of other cases that would seem to grant circuit courts the authority to decide the case on the merits.[197] Referencing the statute in question, the dissent stated that its purpose was unlawful both because it presented an undue burden that unconstitutionally infringed upon a fundamental right, but also because it was crafted in a way that attempted to circumvent judicial review.[198] The fact that courts are unclear not only about *how* to apply the undue burden standard but also *when* it is applicable, demonstrates how flawed the standard is. *Okpalobi v. Foster* is not the only instance in which a circuit court ruled on an abortion provision only to be reversed on a hearing en banc.[199]

In *A Woman's Choice – East Side Women's Clinic v. Newman*,[200] the Seventh Circuit took advantage of the ambiguity present in the undue burden standard, and interpreted the standard as it saw fit.[201] The court did not even make a good-faith inquiry into what the Supreme Court Justices intended, stating instead that, since the *Casey* Court did not give more guidance as to

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[195] Okpalobi v. Foster, 244 F.3d 405, 409 (5th Cir. 2001).
[196] *Id.* ("Sitting as an *en banc* court, we consider whether the district court properly enjoined the "operation and effect" of the Louisiana state tort statute at issue, which provides a private cause of action against medical doctors performing abortions. Although, in this facial attack on the constitutionality of the statute, consideration of the merits may have strong appeal to some, we are powerless to act except to say that we cannot act: these plaintiffs have no case or controversy with these defendants, the Governor and Attorney General of Louisiana, and consequently we lack Article III jurisdiction to decide this case.").
[197] *Id.* at 453.
[198] *Id.* at 443 ("This purpose is illegitimate not only because Act 835 unduly burdens a constitutionally protected right, but also because it seeks to evade judicial review.").
[199] *See* Planned Parenthood Minn. v. Rounds, 653 F.3d 662 (8th Cir. 2011) *opinion vacated in part on reh'g en banc sub nom.* Planned Parenthood Minnesota, N. Dakota, S. Dakota v. Rounds, 662 F.3d 1072 (8th Cir. 2011) *and on reh'g en banc in part sub nom.* Planned Parenthood Minnesota, N. Dakota, S. Dakota v. Rounds, 686 F.3d 889 (8th Cir. 2012).
[200] 305 F.3d 684 (7th Cir. 2002).
[201] *Id.* at 699.

what exactly the term "large fraction" means, they would not "peer into the dark abyss of speculation" to figure out when the amount of women affected becomes a "large fraction."[202] Instead, the majority simply concluded that a statute or regulation that prevents *some*, but not all, women from having an abortion is constitutional.[203] The majority scoffed at the dissent's suggestion that a statute that prevents even just one percent of women from obtaining an abortion can be an undue burden, if that regulation only affects one percent of women to begin with.[204]

In response, the dissent reminded the majority that the statute should be analyzed based on the impact it has on those to which it applies,[205] and even submitted that the majority impermissibly applied the *Salerno* standard, instead of the appropriate undue burden standard.[206] The dissent also took liberty with the "under burden" standard, however, by asserting more definitively than the *Casey* Court, "there are both unconstitutional ways in which costs may be raised and constitutional ones: an increased cost is unconstitutional if it is has the purpose or effect of *forcing* some women to give up their constitutional right to choose abortion; it is constitutional if it genuinely furthers the state's legitimate interest in *persuading* women not to select abortion when faced with an unwanted pregnancy."[207] Though subtly different from what the *Casey* Court actually articulated, this is the type of reserved interpretation necessary to

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[202] *Id.*
[203] *Id.*
[204] *Id.*
[205] *Newman*, 305 F.3d at 709.
[206] *Id.* at 706–07 ("The first question—how many women must be affected—is really another way of putting the question about facial challenges that the majority addresses. In this connection, despite its disclaimers, one is left with the strong impression that the majority is applying either *United States v. Salerno*, or something very close to it. In essence, it holds that a state statute like the one before us now would be unconstitutional only if there was no set of circumstances under which it was valid—by which it seems to mean that not a single woman in Indiana would find the law's burdens tolerable. This is an impermissible back-door application of *Salerno*. Worse yet, it assumes the answer to the question before us: whether the system Indiana wants to put in place will unduly burden Indiana women. Since the pertinent part of the statute has never gone into force, the majority indulges in the presumption that the law imposes no burden at all. But this presumption is found nowhere in our jurisprudence, at least for laws implicating fundamental constitutional rights. Furthermore, this methodology is inconsistent with *Casey*.").
[207] *Id.* at 705.

specifically define the undue burden standard and give it substance.[208] The dissenting opinion was well within the holding of *Casey*, but simply attempted to refine its terminology.[209]

More recently, in *Texas Medical Providers Performing Abortion Services v. Lakey*,[210] the Fifth Circuit neglected to even apply the undue burden standard because the Plaintiff, in a display of artful pleading, only raised compelled speech claims.[211] The Fifth Circuit erred by failing to apply the undue burden standard, however, as the Supreme Court "established the undue burden test as the *sole* standard for assessing the constitutionality of an abortion regulation, rather than as a threshold inquiry for triggering strict scrutiny review."[212] Furthermore, the *Lakey* court erroneously stated that, under *Casey*, the manner in which physicians provide information is irrelevant.[213] In fact, the Court in *Casey* did state that how the information is delivered could impact its constitutionality, particularly if it is intended to "shock" the woman or inflict psychological distress.[214]

The *Lakey* court also misstated or misunderstood the holding in *Casey* when it wrote:

> the requirement that, to avoid the description of the sonogram images, a victim of rape or incest might have to certify her status as a victim, despite fearing (by the very terms of the certification) physical reprisal if she makes her status known...does not transgress the First Amendment. If the State could properly decline to grant any exceptions to the informed-consent requirement, it cannot create an inappropriate burden on free speech rights where

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[208] *Id.*
[209] *Id.*
[210] 667 F.3d 570 (5th Cir. 2012).
[211] *Id.* at 577.
[212] Casey v. Planned Parenthood of Se. Pennsylvania, 14 F.3d 848, 853-54 (3d Cir. 1994).
[213] *Lakey*, 667 F.3d at 580 ("*Casey* did not analyze the doctor's status based on how he provided 'specific information.'").
[214] *Casey*, 505 U.S. at 936 ("To this end, when the State requires the provision of certain information, the State may not alter the *manner* of presentation in order to inflict psychological abuse, designed to shock or unnerve a woman seeking to exercise her liberty right. This, for example, would appear to preclude a State from requiring a woman to view graphic literature or films detailing the performance of an abortion operation. Just as a visual preview of an operation to remove an appendix plays no part in a physician's securing informed consent to an appendectomy, a preview of scenes appurtenant to any major medical intrusion into the human body does not constructively inform the decision of a woman of the State's interest in the preservation of the woman's health or demonstrate the State's profound respect for the life of the unborn.") (internal quotation marks and citations omitted).

> it simply conditions an exception on a woman's admission that she falls within it.[215]

The *Casey* Court, however, invalidated the spousal notification requirement precisely because of the safety issues it raised for affected women and their families.[216] Perhaps the *Lakey* court realized some of the flaws of its evaluation of this informed consent law when it wrote, "[w]e must and do apply today's rules as best we can without hubris and with less sureness than we would prefer."[217]

The most recent cases that have grappled with the undue burden standard are a series of related cases referred to in this Comment as *Rounds I*, *Rounds II*, and *Rounds III*.[218] All three of these cases involved the same informed consent provision, and each of the cases contain involved dissenting opinion.[219] In *Rounds I*, the majority granted a preliminary injunction on the basis that the provisions were unconstitutional, focusing mainly on the fact that it required physicians to orally convey specific information.[220] The majority wrote, "[i]n no case has the Court extended the bounds of permissible regulation to laws which force unwilling speakers themselves to express a particular ideological viewpoint about abortion."[221] The dissent in this case construed the undue burden standard very liberally, stating that "statute does not constitute an undue burden unless it in a "real sense deprive[s] women of the ultimate decision,"[222] that a state's interest in protecting fetal life implies that a state can use physicians "to inform its

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[215] *Lakey*, 667 F.3d at 578.
[216] *Casey*, 505 U.S. at 893–94 ("The spousal notification requirement is thus likely to prevent a significant number of women from obtaining an abortion. It does not merely make abortions a little more difficult or expensive to obtain; for many women, it will impose a substantial obstacle. We must not blind ourselves to the fact that the significant number of women who fear for their safety and the safety of their children are likely to be deterred from procuring an abortion as surely as if the Commonwealth had outlawed abortion in all cases.").
[217] *Lakey*, 667 F.3d at 585.
[218] Planned Parenthood Minnesota v. Rounds, 467 F.3d 716, 722 (8th Cir. 2006) (Rounds I), Planned Parenthood Minnesota, N. Dakota, S. Dakota v. Rounds, 530 F.3d 724, 753 (8th Cir. 2008) (Rounds II), and Planned Parenthood Minnesota, N. Dakota, S. Dakota v. Rounds, 686 F.3d 889 (8th Cir. 2012) (Rounds III).
[219] *Id.*
[220] Planned Parenthood Minnesota v. Rounds, 467 F.3d 716, 722-23 (8th Cir. 2006).
[221] *Id.*
[222] *Id.* at 734.

citizens about the 'philosophic and social arguments' against abortion,"[223] and that the patient only has a limited right not to listen.[224] The dissent went even further, stating that, under the undue burden standard, a state was permitted to use a definition that is intentionally "freighted" in order to emphasize its interest in fetal life.[225] As this Comment has discussed, however, the manner in which information is conveyed cannot be intended to "shock."[226]

In *Rounds II* the majority echoed the opinion of the dissent in *Rounds I*, finding that the categorization of a fetus as a "whole, separate, unique living human being"[227] was simply biological information that was "at least as relevant to the patient's decision to have an abortion as the gestational age of the fetus, which was deemed to be relevant in *Casey*."[228] The majority neglected to engage in a discussion about the legislature's purpose in employing this definition of the word "fetus," or the effect that this definition might have on women.[229] The dissent, on the other hand, felt that the disclosures of the provision at hand far surpassed the mandates of informed consent laws that had been upheld by the Supreme Court and circuit courts in the past.[230] The dissent stated "[r]ather than focusing on medically relevant and factually accurate information designed to assist a woman's free choice," which the Supreme Court and circuit courts have upheld, the provision at issue "expresses ideological beliefs aimed at making it more difficult for women to choose abortions" and that "[t]he obvious objective of the Act . . . is to use the concept of 'informed consent' to eliminate abortions."[231]

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[223] *Id.* at 734-35.
[224] *Id.* at 735.
[225] *Id.* at 738.
[226] Planned Parenthood Minnesota, N. Dakota, S. Dakota v. Rounds, 530 F.3d 724 (8th Cir. 2008).
[227] *Supra* p. 31 note 214.
[228] Planned Parenthood Minnesota, N. Dakota, S. Dakota v. Rounds, 530 F.3d at 726.
[229] *Id.*
[230] *Id.* at 739.
[231] *Id.* at 740-41.

More specifically, with regard to the provision that defined a fetus as a "whole, separate, unique, living human being," the dissent found that the state was mandating the dissemination of "metaphysical ideas unrelated to any legitimate state interest in regulating the practice of medicine," and that "[s]ince the state can assert no legitimate interest in defending the compulsory communication of ideological statements which do not pertain to its regulation of the practice of medicine, these provisions can not withstand constitutional scrutiny."[232] The dissent also disapproved of a suicide advisory, which was the focus of the Eighth Circuit's *en banc* analysis in Rounds III. With regard to the suicide advisory, the dissent found that the "broad mandate about psychological distress and suicide ideation is unlike the requirements in other informed consent laws found to be constitutional, which entrusted the communication of particular medical risks to the doctor's best professional judgment..."[233]

In contrast, the majority in *Rounds III* found that "[o]n its face, the suicide advisory presents neither an undue burden on abortion rights nor a violation of physicians' free speech rights."[234] Though the majority evaluated whether the information required in the disclosure was truthful and non-misleading, that was the extent of its undue burden analysis.[235] The majority opinion focused on whether the language of the provision implied that there was direct causality between abortion and suicide.[236] Finding that it did not, and that it only suggested "increased risk," the majority decided that despite medical uncertainty, the advisory was truthful and non-misleading.[237] The majority neglected to engage in a discussion about the effect of the regulation or whether it placed a "substantial obstacle" in the path of the woman.[238] The court simply

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[232] *Id.* at 743.
[233] *Id.* at 750.
[234] Planned Parenthood Minnesota, N. Dakota, S. Dakota v. Rounds, 686 F.3d 889, 906 (8th Cir. 2012).
[235] *Id.*
[236] *Id.*
[237] *Id.*
[238] *Id.*

concluded that since the information is truthful and non-misleading it is not an undue burden.[239] In fact, the majority opinion does not even mention the term "substantial obstacle" once, despite the fact that the term "substantial obstacle" is supposed to define the undue burden standard.[240]

The dissent took issue with the majority's analysis as well, writing that "[r]ather than recognizing this emerging consensus based on the scientific research in the record before the district court and all the subsequently submitted evidence ... the majority theorizes about the nature of an advisory. In the end it arrives at a new test divorced from the standard established in *Casey*."[241] In criticizes the majority's analysis and proposed standard, pointing out the evidentiary problems that, and writing that, "[u]nder this proposed test, so long as a causal link between abortion and suicide would be theoretically possible, an advisory is truthful, non-misleading, and relevant unless [plaintiff can prove the absence of a causal link with 'scientifically accepted certainty.'"[242]

The many varying interpretations of the undue burden standard that have been articulated in circuit court cases since the Supreme Court adopted the standard in *Casey* demonstrate the very vague and ambiguous nature of the standard.[243] Courts are free to pick and choose which facts are relevant, how to weigh them, and where to draw the lines.[244] This standard is precisely as Justice Scalia suggested – manipulable.[245] The judicial system rests on the shared belief that it interprets the United States Constitution. A standard that can be so obviously manipulated to allow judges to infuse their own personal moral and political viewpoints, particularly in such a controversial area as abortion, suggests that the judiciary is enforcing a political agenda rather

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[239] *Id.*
[240] Planned Parenthood Minnesota, N. Dakota, S. Dakota v. Rounds, 686 F.3d 889, 906 (8th Cir. 2012).
[241] *Id.* at 910.
[242] *Id.* at 911.
[243] *Id.*
[244] *Id.*
[245]

than the Constitution of the United States, and thereby threatens the legitimacy of the judicial system. If the undue burden standard is to remain the analysis for evaluating the constitutionality of abortion regulations, there must be a more consistent and uniform approach to its application, or the integrity of the judicial system, not to mention women's right to choose, may not endure.

V. Restoring Order to Abortion Jurisprudence

A. Bringing Structure and Uniformity Undue Burden Standard

Even assuming that the informed consent statutes are restored to their former integrity and that paternalistic justifications are abandoned, the undue burden standard must obtain some structure and uniformity in order to determine what is acceptable and what is not, with reference to informed consent statutes, but also for future regulations of the abortion procedure. One way to bring structure to the undue burden standard is to organize some of its elements into a disjunctive, three-prong, fact-intensive test. The first step would be to determine whether the information is truthful, non-misleading, and relevant to the decision to have an abortion. The second prong would be an investigation into the true purpose of the statute, as evidenced by legislative history and any other relevant evidence. Finally, courts should investigate what the effects of the statute are in practice.

These elements are all present in some way in the current undue burden standard, but the lack of any analytical process allows courts to pick and choose which points to focus on, and adds to the manipulable nature of the standard. Reformulating the undue burden standard as a three-part test will force the courts to address all the aspects of the standard, thereby creating some organization and uniformity in both analysis and outcome. Perhaps the most important aspect of this reformulation is that it should be very fact-intensive. Courts should not be able to ignore the realities of science or the effects of the laws when conducting an analysis. For

example, courts should not be permitted to conclude that a twenty-four hour waiting period is not an undue burden because one day is such a short delay, if the evidence and studies demonstrate that a mandatory twenty-four hour waiting period actually results in a delay of a week or more for most women. Courts should not be able to conclude that informing women that an abortion can lead to an increased risk of suicide or cancer is truthful and non-misleading and therefore not unduly burdensome when the medical evidence does not support these claims.

Whether something is an undue burden or a substantial obstacle is more of a conclusion than a test. To help circuit courts avoid making arbitrary, inconsistent and unsubstantiated determinations that a regulation imposes an undue burden, the application of the undue burden standard should be structured into a three-prong analysis composed of the concepts disjointedly discussed in *Casey*. Circuit courts' analyses and evaluations must be heavily concentrated on (1) whether the information is, in fact, truthful, non-misleading, and relevant to the decision to have an abortion (2) the true purpose of the statute or regulation, and (3) the effect of the statute or regulation. As suggested by Justice O'Connor, this should be a heavily factual analysis.[246]

Circuit courts should first engage in an analysis of whether the information mandated is truthful, non-misleading, and relevant to the decision to have an abortion. First, it should be taken into consideration whether that jurisdiction is one in which a "physician-based" or "patient-based" approach to informed consent has been adopted, in order to determine the relevance of the information. Furthermore, the analysis for determining the veracity of the

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[246] *Casey v. Planned Parenthood of Se. Pennsylvania*, 14 F.3d 848, 861 (3d Cir. 1994) ("By basing its rulings on informed consent and recordkeeping 'on the record,' the Court signaled that it was not announcing a *per se* rule. At a minimum, we believe the Court meant that other state abortion laws require individualized application of the undue burden standard. Our view is bolstered by Justice O'Connor's concurring opinion denying a stay in *Fargo Women's Health Organization v. Schafer,* which noted: 'the joint opinion [in *Casey* III] specifically examined the record developed in the district court in determining that Pennsylvania's informed consent provision did not create an undue burden.... [T]he lower courts [in *Fargo*] should have undertaken the same analysis,' and '[t]he fact-bound nature of the new standard-inquiring if the law is a "substantial obstacle,"' *Casey* III suggests that a challenge after enforcement of the Pennsylvania Act might yield a different result on its constitutionality.') (internal citations omitted).

information should be a heavily factual analysis, informed by facts, science, studies, and, most importantly, the medical judgment of the physician,[247] not the opinions and baseless assertions of the legislature. Information permitted should be limited to truthful, complete, medically relevant information, as it cannot be fairly stated that medically uncertain or incomplete information is truthful and non-misleading, or that it accomplishes the goals of informed consent.

Alternatively, if a legislature wants to more strongly voice its preference for childbirth and its respect for the potential life by making women aware of information that may be medically inconclusive, it should be required to disclose (1) the state is voicing its express preference for childbirth over abortion, and (2) the information given is inconclusive. By making those disclosures, the legislature is still able to express its preference for childbirth over abortion, and is still able to make women aware of inconclusive information, but it is not able to do so manipulatively by passing this information off as being neutral, complete, and certain.

Furthermore, any other requirements should be limited to the confines, standards, and guidelines of medical associations and authorities that govern the medical profession, as the court itself has stated that it is not a receptacle for the regulation of the medical profession. The details of informed consent and information should be left to the experts, and any information mandated by the legislature should be limited to the confines of acceptable medical knowledge, standards, and guidelines. We must allow the experts in the medical field to inform our laws, not the other way around.

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[247] Karlin v. Foust, 188 F.3d 446, 465 (7th Cir. 1999) ("In reaching this conclusion, we are mindful of the Supreme Court's admonition that a state abortion statute should not unduly limit a physician's discretion in making medical determinations. *See, e.g., Colautti,* 439 U.S. at 396–97 (reasoning that a physician must be afforded adequate discretion in the exercise of his medical judgment)."); Okpalobi v. Foster, 190 F.3d 337, 355 (5th Cir. 1999) *on reh'g en banc,* 244 F.3d 405 (5th Cir. 2001) ("In *Jane L.* the Tenth Circuit held unconstitutional a Utah law that equated viability with twenty weeks gestational age as measured from conception because, *inter alia,* the law had the impermissible purpose of usurping the physician's responsibility for determining fetal viability and, thus, providing a vehicle for challenging the holding of *Roe v. Wade* ... the court also rests its conclusion that the Utah legislature adopted the measure for a forbidden purpose on the fact that the act on its face denied physicians the discretion granted them under well-established precedent.").

After a thorough analysis, and after evaluating the facts, courts can conclude whether the information is truthful, non-misleading, and relevant to the decision to have an abortion. This must be the primary analysis for two reasons. First, if a court finds that the mandated information is not truthful, non-misleading, and relevant, then the undue burden standard is not implicated. The law at issue would then fall within protections of the First Amendment, and would fail on First Amendment grounds as compelled speech. Second, because finding that the legislature is requiring false, misleading, or irrelevant information under the guise of "informed consent" should be considered when evaluating the true legislative purpose of a statute. If, for example, a court finds that the information is true, non-misleading, and relevant, this finding would bolster the legislature's argument that the stated purpose is to further the legitimate and compelling interest of protecting the health and life of the mother as well as the potential life of the fetus. If, on the other hand, the court were to find that the information mandated were false, misleading, or irrelevant, it may undermine the state's argument that the stated purpose is to further the legitimate and compelling interest of protecting the health and life of the mother as well as the potential life of the fetus.

Assuming that the court finds that the information mandated is adequate and acceptable, the analysis should proceed to scrutinize the purpose of the statute. The court should not simply give deference to the stated purpose of the statute. Rather, the court should *consider* the stated purpose of the statute, but it should not end there. The court should also consider the nature and quality of the information being mandated, the legislative history, the state's holistic policy regarding women's reproductive health, and the legal and medical necessity of the law. While it is not the court's job to evaluate a state's policy decisions, it *is* the court's job to ensure that those policies fall within the boundaries of the constitution. If, for example, the legislature were

to pass a law that required steps that served no medical or legal purpose (that were medically and legally superfluous and irrelevant), then the court must conclude that the legislature was not attempting to protect the life and health of the mother or the potential life of the fetus. In that instance, the burden imposed by the law and its dissuasive effects should not be permissible. If, however, the court engaged in (1) the informational analysis, and found that the disclosures were truthful, non-misleading, and relevant to the decision to have an abortion, and (2) the purpose analysis, and found that the law served some medically or legally relevant purpose, then any dissuasive effect the regulation might would likely be permissible and not an undue burden because of the other legitimate accomplishments of that law.

Finally, assuming that the information required is truthful, non-misleading, and relevant to the decision to have an abortion, and that the legislature has a permissible purpose for enacting the legislation, the court should evaluate the effect of the statute or regulation. This step of the analysis is what courts have tended to focus on up to this point. This analysis, like the rest of the undue burden analysis, and as suggested by Justice O'Connor, should also be a factual analysis. This analysis should not rest on the opinions of the judges or legislature as to whether a given impact is merely an inconvenience or an undue burden. The circuit courts should engage in a factual analysis, informed by studies and statistics from the given state and, where applicable, testimony from women who have been impacted by the legislation. This is the point in the analysis where the circuit courts will inevitably have the most discretion, but the courts should still attempt to create uniformity and consistency. At this point, the analysis is guided by whether "a substantial portion of affected women" are prevented from obtaining an abortion or are otherwise facing an undue burden, such as being restricted from "the most common" types of abortion. The determinations made in each step of this analysis should lead to the *conclusion* that

a given regulation is a *substantial obstacle or undue burden*, and therefore unconstitutional, as opposed to using the term "substantial obstacle" itself as the test.

This Comment argues that, as Justice O'Connor suggested, a heavy factual analysis is the only way to make the undue burden standard a workable standard and to avoid arbitrary and capricious application. Engaging in a factual analysis will force legislatures to stay true to the purposes of protecting the health and life of the mother and the potential life of the fetus, while still allowing them to express their preference for childbirth over abortion. Conducting a factual analysis will also assist circuit court judges in evaluating this very personal, emotional, and controversial issue rationally, objectively, and free from the infiltration of personal, moral, and religious, opinions and beliefs. Adopting the proposed solution is the best way to truly protect the woman's fundamental right to terminate her pregnancy, as well as the right to control her health, her life, and the life of her unborn child. Taking a structured approach is the best way to accomplish uniformity and consistency in the application of the undue burden standard, and the only way to avoid its arbitrary and capricious application.

B. Reviving the Spirit of Informed Consent: Limiting Includable Information to Medical Facts and Excluding Ideology by Denying Deference to Legislature

The greatest danger with recent informed consent statutes is that they are manipulating women, who are already in a very vulnerable position, into thinking that they are being given unbiased, complete information, when in fact, the line of abortion jurisprudence has invited state legislatures to turn what should be objective, complete, and valuable information, into a covert vehicle for state ideology.[248] The justification for this has been that abortion is different, because it involves the termination of a potential life.[249] Of course it is true that abortion is different, and

[248] *Supra* p. 25 note 71.

[249] See, e.g. Gonzales v. Carhart, 550 U.S. 124 (2007).

perhaps this ideological information should be available to women, but it should *not* become a part of an informed consent procedure. All people, including women, assume is straightforward, objective, medical information because in all other contexts, it is.

Informed consent forms in the abortion context should be no different than those of any other medical procedures. They should be limited to scientific and medical information that is supported by the weight of authority, inform the patient of any included information that is inconclusive or for which there is disagreement among medical professionals, and be free from information that is ideological or that is not directly related to the procedure. Allowing the state to express its viewpoint covertly as required information in an informed consent statute gives the state license to manipulate women and prevent them from making a truly informed choice. A more acceptable approach would be to maintain the integrity of the informed consent procedure, and create another document in which both ideological perspectives can be voiced, giving the woman full perspective and complete information, and the opportunity to weigh each option for herself.

The informed consent disclosure standards discussed in Part I, namely, the professional practice, reasonable person, and self-determination standards, do not currently play any role in the evaluation of the constitutionality of abortion informed consent laws. Although the undue burden standard does not incorporate these different theories, it should. These different standards will eliminate some of the ambiguity in deciding what is "relevant" to a woman's decision to have an abortion. Currently, under the undue burden standard, the legislature has the greatest authority to decide what is relevant.[250] If these standards were considered, however, abortion informed consent laws would fall more in line with each state's general informed

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[250] *Id.*

consent laws, with regard to who gets to decide the relevance and materiality of certain information.[251]

C. Disallowing Paternalism as an Acceptable Justification for Informed Consent Statutes

Many recent informed consent statute requirements, such as mandatory waiting periods, are justified by the notion that women should make an informed choice and thereby benefit by being "given" the extra time to reflect upon their options.[252] Different variations of this rationale have been accepted by a number of courts as being legitimate. This rationale perpetuates stereotypes about women needing protection and being incapable of making difficult decisions on their own. This rationale assumes that women do not spend the appropriate amount of time reflecting on their decision before deciding to get an abortion, and that they could not have known or understood their options without the mandatory information and waiting period. In reality, however, women are quite capable of making these decisions on their own. Studies have shown that "women who make the decision to have an abortion understand the responsibilities of parenthood and family life;[253] six in ten are already a parents.[254] More than half of women who have an abortion say they want a child or another child at a later point in their life.[255] Most cite concern or responsibility for someone else as a factor in their decision.[256] These studies should be recognized and valued and should prevent such paternalistic notions about women from being perceived as legitimate and compelling justifications for these statutes.

VI. CONCLUSION

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[251] *Id.*
[252] See, e.g., Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833 (1992).
[253] Guttmacher Institute, Abortion in Women's Lives, May 2006 http://www.guttmacher.org/pubs/2006/05/04/AiWL.pdf; See also Lawrence B. Finer, Lori F. Frohwirth, Lindsay A. Dauphinee, Susheela Singh and Ann M. Moore, *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, (Sept. 2005), http://www.guttmacher.org/pubs/journals/3711005.html.
[254] *Id.*
[255] *Id.*
[256] *Id.*

Perhaps its true that "[l]iberty finds no refuge in a jurisprudence of doubt," but Justice Scalia was right to retort that "[r]eason finds no refuge in this jurisprudence of confusion," either.[257] Restructuring the undue burden standard into a disjunctive, three-part test, in which in prong is analyzed using objective criteria and a heavily factual analysis is a comprehensive approach to making to making the undue burden standard workable in practice. This approach still allows the states to further its interests in preserving potential life and persuading women to choose childbirth, but it is also much more effective in protecting women's rights than the undue burden standard in its current form. *Some* solution must be adopted, because as it stands the undue burden is too easily manipulated, and allows states to maneuver around the safeguards the Court attempted to put into place.

Furthermore, in order to preserve the integrity of the doctrine of informed consent, the physician-patient relationship, and the medical profession in general, courts must engage in an independent analysis of the accuracy of mandated factual disclosures, and refrain from the admittedly easier but ineffective practice of giving deference to legislative fact-finding.[258] Furthermore, when considering the purpose of a given statute, paternalistic notions should be abandoned as illegitimate and unacceptable justifications for informed consent statutes, and any other statutes that regulate abortion. By reducing unwarranted judicial deference to legislative fact-finding, eliminating paternalism, and, only *then* proceeding to a structured analysis of constitutionality under the undue burden standard, the federal circuit courts will create greater

[257] Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833, 993 (1992).

[258] Amanda McMurray Roe, *Not-So-Informed Consent: Using the Doctor-Patient Relationship to Promote State-Supported Outcomes*, 60 Case W. Res. L. Rev. 205, 207-08 (2009) ("The proposed standard of review will incorporate a closer examination of the scientific foundation underlying specific informed consent statutes that gives greater deference to the views of the scientific and medical communities at large, rather than deferring to legislative determinations of medical fact. Such review is imperative to maintain the integrity of informed consent given legislatures' increasing proclivity to misuse scientific or medical information to achieve a particular, typically political, end.").

consistency in the analysis and outcomes of similar cases, increase the legitimacy of the judicial system, and more effectively protect the rights of women in this delicate and controversial area.